Supreme Court, U.S.
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No. 95-857

In The

Supreme Court of the United States

October Term, 1995

CAESAR HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal conviction may be sustained based upon otherwise insufficient evidence simply because the defendant has taken the stand and affirmatively declared his innocence?

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This amicus brief is filed pursuant to Rule 37 of the United States Supreme Court. Both petitioner and respondent have granted amicus consent to file this brief, and the letters of consent have been filed with the Clerk of the Court.

INTEREST OF AMICUS

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation which currently has a membership of more than 8,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded over 25 years ago to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Members of the NACDL have an ethical responsibility to provide criminal defendants with the effective assistance of counsel guaranteed under the Sixth Amendment. Members of the NACDL have a continuing duty to vigorously represent criminal defendants before the state and federal courts and stay informed of the development of the criminal law.

Among the NACDL's objectives is to insure the proper administration of criminal justice and to protect individual rights guaranteed by the Bill of Rights. Members of the NACDL have a vital interest in ensuring that

constitutional rights such as the right of an accused to testify at his/her criminal trial are exercised voluntarily, with an understanding of the legal implications of their exercise, and without any unconstitutional burdens upon the exercise of those rights. The Eleventh Circuit's rule – that a criminal defendant who testifies and asserts his innocence effectively waives his constitutional right to have the government prove all of the elements of the offense beyond a reasonable doubt – impermissibly burdens the defendant's right to testify and will have its greatest negative impact on the class of defendants most likely to testify: innocent ones.

REASON FOR GRANTING THE WRIT

This case raises a fundamental question of criminal procedure that has sharply divided the lower courts: whether a defendant's testimony *denying* guilt and asserting his innocence may, by itself, constitute sufficient evidence to support the jury's verdict of guilt beyond a reasonable doubt. The Eleventh Circuit's answer is yes so long as the government presents some (though insufficient) corroborative evidence of guilt. In other words, in the Eleventh Circuit's view, in virtually every case the government is likely to bring – *i.e.*, in those cases where there is at least some corroborative evidence – a defendant's testimony *denying* guilt constitutes sufficient affirmative evidence to uphold a conviction. This sweeping rule conflicts with decisions of this Court and with decisions of at least five other circuits. More importantly, it undermines the primary function of criminal appellate

review – to protect the innocent from wrongful conviction. Accordingly, this case merits review.[1]

SUMMARY OF ARGUMENT

Faced with insufficient evidence of petitioner's guilt, and uncontroverted evidence of his innocence as presented by the government, the Eleventh Circuit rejected the petitioner's challenge to the sufficiency of the evidence presented at trial because he took the stand and denied his guilt. According to the Eleventh Circuit's general rule, as announced in *United States v. Brown*, 53 F.3d 312 (11th Cir. 1995), *petition for cert. filed sub nom. Mullis v. United States*, 64 U.S.L.W. 3333 (U.S. Oct. 10, 1995) (Case No. 95-693), and applied in this case, when a criminal defendant testifies and *denies* his guilt, his testimony, by itself, may establish the elements of the offense for purposes of appellate review.

In addition to creating a direct conflict among the circuits, *see* Petition for Certiorari, at pp. 6-10, the rule applied by the Eleventh Circuit unconstitutionally penalizes a criminal defendant for testifying in his own defense. The Eleventh Circuit's rule also eliminates the government's burden of proving all elements of the offense beyond a reasonable doubt, in violation of the rights of a criminal defendant under the Due Process

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[1] A petition for certiorari, raising substantially the same issue as raised herein, is currently pending in another case originating in the Eleventh Circuit. *See Mullis v. United States*, 64 U.S.L.W. 3333 (U.S. Oct. 10, 1995) (Case No. 95-693).

Clause of the Fifth Amendment. This Court should grant certiorari to review this issue of great importance to the administration of justice.

ARGUMENT

THIS COURT SHOULD RESOLVE THE CONFLICT REGARDING WHETHER INSUFFICIENT EVIDENCE OF A DEFENDANT'S GUILT IS AUTOMATICALLY RENDERED SUFFICIENT SIMPLY BECAUSE THE DEFENDANT TOOK THE STAND AND DECLARED HIS INNOCENCE

The NACDL encourages review of a decision that undermines the primary function of appellate review and a basic goal of the criminal justice system: to protect the innocent from wrongful conviction. The Eleventh Circuit's decision in this case, which relied upon an earlier opinion by a divided panel of the Eleventh Circuit in *United States v. Brown*, 53 F.3d 312 (11th Cir. 1995), *petition for cert. filed sub nom. Mullis v. United States*, 64 U.S.L.W. 3333 (U.S. Oct. 10, 1995) (Case No. 95-693), effectively holds that when a defendant testifies and denies his guilt, and a jury thereafter finds him guilty, the defendant's testimony will *ipso facto* be viewed by the reviewing court as substantive evidence of his guilt. That is, where the government presents "some corroborative evidence of guilt" in its case-in-chief, *id.* at 314, and the defendant thereafter testifies and asserts his innocence to the charges, his challenge to the sufficiency of the evidence will be summarily rejected even if the government's evidence was otherwise insufficient.

This rule – that a jury's apparent disbelief of a criminal defendant's testimony invariably constitutes positive evidence of guilt – has been rejected by five other circuits. *See United States v. Aulicino*, 44 F.3d 1102, 1114-15 (2d Cir. 1995); *Stallings v. Tansy*, 28 F.3d 1018, 1023-24 (10th Cir. 1994); *United States v. Zeigler*, 994 F.2d 845, 849-50 (D.C. Cir. 1993); *United States v. Slone*, 601 F.2d 800, 804 (5th Cir. 1979); *United States v. Pechenik*, 236 F.2d 844, 847 (3d Cir. 1956); *but see United States v. Zafiro*, 945 F.2d 881, 888 (7th Cir. 1991), *aff'd on other grounds*, 506 U.S. 534 (1993) (adopting rule applied by Eleventh Circuit). The rule has also been rejected by this Court in the context of a denaturalization case, *see Nishikawa v. Dulles*, 356 U.S. 129, 137 (1958) ("Nor can the district judge's disbelief of petitioner's story of his motives and fears fill the evidentiary gap in the Government's case."), and other civil cases as well. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984) ("Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion.") (citation omitted); *Moore v. Chesapeake & O. Ry.*, 340 U.S. 573, 576 (1951) ("[D]isbelief of the engineer's testimony would not supply a want of proof.").

This Court should grant certiorari to reject the Eleventh (and Seventh) Circuit's rule. The rule is unconstitutional as applied to defendants in criminal cases, where the burden of proof on the plaintiff is more exacting and the consequence of an erroneous jury verdict is more tragic. First, the rule penalizes innocent and truthful defendants who exercise their fundamental constitutional right to testify, and impermissibly burdens that right by deterring future innocent defendants from testifying and

truthfully asserting their innocence. Second, the rule violates due process by allowing the jury to convict a defendant based on "negative inferences," thus eliminating the requirement that the government affirmatively prove all elements of an offense beyond a reasonable doubt.

A. Right To Testify

The right to testify is one of the rights that is "essential to due process of law in a fair adversary process." *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)). It is a fundamental constitutional right, which is found in the Compulsory Process Clause of the Sixth Amendment, the Due Process Clause of the Fifth Amendment, and as a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir.) (en banc), *cert. denied*, 113 S. Ct. 127 (1992); *United States v. Martinez*, 883 F.2d 750, 754 (9th Cir. 1989), *vac. on other grds.*, 928 F.2d 1470 (9th Cir.), *cert. denied*, 501 U.S. 1249 (1991); *see also Nix v. Whiteside*, 475 U.S. 157, 164 (1986).

The decision whether to testify arises in every criminal case. It often represents the single most important factor in a criminal case. *See* Anthony Amsterdam, *Trial Manual for the Defense of Criminal Cases*, sec. 390 (3d ed. 1974); Edward Bennett Williams, *The Trial of a Criminal Case*, 29 N.Y.St.B.A.Bull. 36, 42 (1957). Although the decision is personal to the accused, it is defense counsel to whom the defendant turns for advice regarding the legal implications of testifying. *Teague*, 953 F.2d at 1533. This has historically included, *inter alia*, a discussion of the

penalties of perjury, the possibility that the facts elicited from the defendant's testimony will support the government's theory of the case, and the potential for impeachment with prior convictions and inconsistent statements. *See generally Teague*, 953 F.2d at 1533 n.9.

The right to testify is not unconditional. *See Nix v. Whiteside*, 475 U.S. 157 (1986) (no constitutional right to commit perjury); *Harris v. New York*, 401 U.S. 222 (1971). To be sure, a defendant's decision to testify in a criminal case necessarily entails the waiver of certain constitutional rights, such as the Fifth Amendment privilege against compelled testimony, and the assumption of certain risks, such as the risk of impeachment by prior inconsistent statements and prior convictions. *See Harris*, 401 U.S. at 225 (holding that defendant who testifies could be impeached by prior contrary statements which had been ruled inadmissible under *Miranda v. Arizona*, 384 U.S. 436 (1966)); *see also* Fed.R.Evid. 609. However, these conditions and risks are tolerable, and indeed laudable, because they are "consistent with the governance of trial conduct in what we have long called 'a search for truth.' " *Nix*, 475 U.S. at 171. They reflect the unassailable principle that "when defendants testify, they must testify truthfully or suffer the consequences." *United States v. Havens*, 446 U.S. 620, 626 (1980).

In accordance with these general principles, reviewing courts have often treated a defendant's *obviously perjured* testimony as positive evidence of guilt that fills in an evidentiary gap in the government's case. *See, e.g., Wright v. West*, 505 U.S. 277, 295-96 (1992) (opinion of Thomas, J.) (treating defendant's "uncorroborated and confused testimony" as affirmative evidence because

defendant "failed to offer specific information about how he had come to acquire any of the stolen items," and "*contradicted himself* repeatedly about where he supposedly had bought the stolen goods, and he gave vague, seemingly evasive answers to various other questions.") (emphasis added); *United States v. Bennett*, 848 F.2d 1134, 1138-39 (11th Cir. 1988) (defendants who were occupants of a boat loaded with weapons, $110,000 in cash, and aeronautical map with signals for radio frequencies, and who pulled up near an unoccupied vessel containing over 750 kilograms of cocaine, testified that the cash constituted gambling winnings, and that they had been out fishing, but there was no fishing equipment on the boat). Before concluding that a defendant's trial testimony was perjured, however, reviewing courts have been careful to evaluate the quality of the defendant's testimony to determine whether it was *inherently implausible* or *internally inconsistent*. *See Wright v. West, supra; Bennett, supra; see also United States v. Zeigler*, 994 F.2d 845, 849 (D.C.Cir. 1993) ("The situation would be different if the defendant's testimony, *on its face*, were utterly inconsistent, incoherent, contradictory or implausible.") (emphasis added); *United States v. Eley*, 723 F.2d 1522, 1525 (11th Cir. 1984) ("Eley's explanation is so implausible that it gives rise to positive evidence in favor of the government."). Only if a defendant's story of innocence is unbelievable or internally contradictory can an appellate court have some assurance that "when the defendant said 'black' the jury reasonably could have concluded that the truth was 'white.' " *Zeigler*, 994 F.2d at 849.

The Eleventh Circuit's sweeping new rule is unfair and unprincipled because it presumes from the jury's

verdict alone that the defendant's testimony was perjured. The rule does not distinguish between a defendant's testimony that is inherently implausible and a defendant's testimony that, as here, is plausible and consistent with the testimony of the government's cooperating witness. Indeed, on these facts, the Eleventh Circuit did not, nor could it, conclude that petitioner's testimony was implausible or inconsistent.

The flaw in the Eleventh Circuit's new rule is that it assumes too much. First, it unfairly assumes that a guilty verdict means that the jury disbelieved the defendant's testimony. There are a variety of irrational reasons why a jury may find a defendant guilty even though they believed his testimony. This might occur, for example, if a jury disliked a defendant because of his religious or unpopular political beliefs, or his prior conviction, or if the jury was unable to follow and understand the evidence and the court's instructions. Second, even accepting the assumption that the jury's verdict means that the jury disbelieved the defendant's testimony, the rule unfairly assumes that such disbelief means that the defendant perjured himself (and, thus, the fabricated evidence constitutes consciousness of guilt). In analogous circumstances, this Court recently held that "not every accused who testifies at trial and is convicted will incur an enhanced sentence under [U.S.S.G.] 3C1.1 for committing perjury." *United States v. Dunnigan*, 507 U.S. 87, 113 S. Ct. 1111, 1117 (1992). This Court reasoned that "an accused may give inaccurate testimony due to confusion,

mistake or faulty memory." *Id.*[2] The fact that an accused may have given *inaccurate* testimony does not establish consciousness of guilt. *See generally* Devitt & Blackmar, *Federal Jury Practice and Instructions*, §14.06 (1992) (a defendant's *knowingly* false explanation may reflect consciousness of guilt).

Presuming from the jury's verdict alone that a defendant's uncontradicted and plausible testimony was actually false burdens his/her right to testify and creates the intolerable risk that innocent defendants will be convicted simply because they told the truth and asserted their innocence. These conditions and consequences are not reasonably designed to further the primary goal of the criminal justice system – the search for truth and the protection of the innocent from wrongful conviction.

B. Due Process

The Eleventh Circuit's rule violates the constitutional requirement that the government prove beyond a reasonable doubt every fact necessary to constitute the crime. *In re Winship*, 397 U.S. 358, 364 (1970); *Jackson v. Virginia*, 443 U.S. 307 (1979). Certainly the jury, as the factfinder, is entitled to reject the plausible and uncontradicted testimony of a defendant on the basis of his demeanor. *See generally Glasser v. United States*, 315 U.S. 60, 80 (1942). Moreover, the fact that the defendant has presented a

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[2] In this case, the district court did not enhance the petitioner's sentence for perjury under United States Sentencing Guideline §3C1.1. Nor did the government seek an enhancement of petitioner's offense level for perjury under §3C1.1.

plausible story of his innocence does not require the reviewing court to set aside the verdict if the evidence of guilt is *otherwise sufficient*. *See United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc) (jury may choose among rational constructions of evidence and evidence need not exclude every reasonable hypothesis of innocence), *aff'd*, 462 U.S. 356 (1983). But to suggest that a plausible story of innocence presented by the defendant can somehow close a hole in the government's case and transform an irrational jury verdict into a rational one violates due process.

Judicial review of the evidence protects innocent defendants from guilty verdicts that are based on irrational factors such as the defendant's race, religion, prior conviction, or the jury's refusal to follow, inability to understand, or inattention to the evidence and the court's instructions. It is axiomatic that "juries sometimes get things wrong," *Zeigler*, 994 F.2d at 849, because if juries invariably got things right, there would be no need for judicial review of the evidence. In *Brown*, the Eleventh Circuit held for the first time "that the evidence supporting the conviction of a defendant who takes the stand and testifies in his own behalf is unreviewable." *Brown*, 53 F.3d at 315 (Moye, J., dissenting). By its new rule, the Eleventh Circuit has implicitly decided that juries never get things wrong *in cases where defendants testify* – a distinction that is based neither in logic nor empirical facts. Plainly, a jury may be motivated to return a guilty verdict by any one of the above-cited irrational factors even in cases where the defendant has testified. As such, there is no basis to destroy the protection of appellate review of

the sufficiency of the evidence in cases in which defendants testify. *Zeigler*, 994 F.2d at 850.

The Eleventh (and Seventh) Circuit's rule increases the risk that innocent persons will be wrongfully convicted. The rule applies to cases in which: 1) the evidence presented by the government is insufficient to sustain a conviction but the district court refuses to grant a judgment of acquittal at the close of the government's case, and 2) the defendant testifies in his own defense. Those cases are by definition the ones in which it is most likely that the defendant is *innocent*, not only because of the lack of evidence but also because guilty defendants are less likely to testify.[3] Nevertheless, the Eleventh (and Seventh) Circuit's rule strips defendants in such cases of sufficiency review, the primary safeguard against irrational and improper verdicts. *See generally Jackson v. Virginia*, 443 U.S. at 315. Thus, this rule violates due process.

Finally, the rule applied by the Eleventh and Seventh Circuits frustrates the search for truth. The rules that govern the procedure of criminal cases and the administration of justice should be designed to *encourage* innocent defendants to testify. Yet, this rule will undoubtedly *discourage* innocent defendants from testifying in cases where the evidence is lacking but the district court fails to

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[3] As a general proposition, guilty defendants are less likely to testify than innocent defendants because of the potential penalties of perjury, the inability of a guilty defendant to fashion a coherent story of innocence and withstand pointed cross-examination, and the ethical considerations that require a criminal defense lawyer to advise a client he/she knows is guilty not to testify.

grant a judgment of acquittal at the close of the government's case. In that regard, criminal defense lawyers who practice in the district courts of these circuits will often be in the unenviable position of advising their innocent clients not to testify so as to preserve for appellate review a meritorious claim of insufficient evidence. As a result, the jury will be deprived of the truth.

CONCLUSION

For the foregoing reasons, Petitioner Hernandez's petition for writ of certiorari should be granted.

Respectfully submitted,

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